

Zhang (Migration) [2022] AATA 4585 (16 November 2022)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Kai Zhang
VISA APPLICANT:	Mr Zhongxiang Zhang
REPRESENTATIVE:	Mr Joe Zou (MARN: 1388065)
CASE NUMBER:	2201158
HOME AFFAIRS REFERENCE(S):	BCC2021/874020
MEMBER:	Nicole Burns
DATE:	16 November 2022
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Visitor (Class FA) visa.

Statement made on 16 November 2022 at 11:09am

CATCHWORDS

MIGRATION – Visitor (Class FA) visa – Subclass 600 (Visitor) – incorrect information in the visa application – applicant’s migration history – period of unlawful residence – applicant accompanying his grandchild to his parents in Australia – compassionate and compelling circumstances – grandchild’s lengthy pandemic separation from parents – decision under review affirmed

LEGISLATION

*Migration Act 1958, ss 5(1), 65
Migration Regulations 1994, Schedule 2, cls 600.211, 600.213; Schedule 4, Public Interest Criterion 4020; r 1.03*

CASES

*Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 27 January 2022 to refuse to grant the applicant a Visitor (Class FA) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
4. The applicant applied for the visa on 17 January 2022. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 600.213 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because they found the applicant did not satisfy Public Interest Criterion (PIC) 4020.
5. The review applicant – who is the applicant's son - appeared before the Tribunal via video hearing on 9 November 2022 to give evidence and present arguments about the issues in the case. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
6. The review applicant was represented in relation to the review. The representative was present at hearing.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 600.213 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
9. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

10. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
11. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
12. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
13. In the delegate's decision record (a copy of which the review applicant provided to the Tribunal on review) it records that the applicant failed to declare his immigration history, including having a student visa cancelled in 2013 and overstaying until he departed Australia in 2018 when he applied for the visitor visa. He also declared 'No' to previous travel history in the visitor visa application.
14. The applicant was invited to comment on this information via a letter from the delegate dated 25 January 2022. In a written response from his representative dated 26 January 2022 the applicant indicated (according to the representative) that he did not think he had to declare his previous travel history, as the three-year bar towards making a visa application had lapsed. He adds that the purpose of the visitor visa was to accompany his grandchild (Aaron) to return to his parents and start school in Australia.
15. The delegate found the applicant had provided information that is false or misleading in a material particular in relation to the application for the visa and was not satisfied there were compelling or compassionate reasons justifying the granting of the visa.
16. On review the representative provided to the Tribunal copies of a letter he sent to the Department about the purpose of the proposed visit; a letter from the review applicant to his father inviting him to accompany Aaron back to Australia; a copy of an ANZ account summary in relation to the review applicant's family trust; and photographs of the applicant's fish farming business in China. Also provided were documents evidencing the relationship between the review applicant, visa applicant and the review applicant's son: including Chinese family register documents (untranslated) and Aaron's Australian birth certificate.
17. Also provided was a copy of a letter the representative had sent the Department in response to a letter from the Department inviting the applicant's comments on the potentially adverse information. In it the representative states that at the time (of the visitor visa application) the applicant did not disclose this adverse information to him. After he received the Department's letter the applicant confirmed he failed to declare his travel history, believing he did not have to as the three-year bar was over.

18. The representative argues there are compassionate and compelling circumstances in this case: specifically because the applicant is the grandparent of an Australian citizen, and parent of an Australian permanent resident who seeks the visa to accompany his six-year-old grandchild to Australia to start his education and live with his father.
19. At hearing the review applicant acknowledged his father failed to declare his immigration history on the visitor visa application, noting it was a long time ago, and his father forgot: he was not trying to deliberately hide his immigration history. The review applicant explained that his father had accompanied him whilst he was studying in Australia. However the review applicant stopped studying and his student visa was cancelled, but his father was unaware of this fact at the time. The review applicant's partner then fell pregnant, and his father wanted to stay in Australia to help them care for their new child and settle down, before returning to China.
20. The review applicant told the Tribunal he has two sons, aged six and four. His eldest, Aaron, went to China with his grandmother at the end of 2019 and because of COVID-19-related travel restrictions, he has stayed there. The applicant applied for the visitor visa to accompany Aaron back to Australia, to be ready to start primary school in early 2023.
21. The review applicant said his father is the only person who can accompany Aaron to Australia, as he runs his own business (in roof construction) and cannot be away for long (particularly given COVID-related restrictions continue in China, including possible quarantine). The review applicant's mother has heart problems and therefore it is too dangerous for her to travel, he added.
22. In a post hearing submission to the Tribunal the representative said that Aaron's mother is an Australian citizen and visa applications to visit China are still closed for 'unhumanitarian purposes'. Therefore Aaron's mother is unable to obtain a visa to pick him up from China.
23. At hearing the representative argued that it is in Aaron's – an Australian citizen – interests to return to Australia for schooling and if he is unable to do so, he will miss school for another year or two.
24. In a post hearing written submission provided to the Tribunal the representative argued that there are compassionate and compelling circumstances in the applicant's case to waive the PIC 4020 requirements. He submits the delegate did not consider the interests of the review applicant, who is a permanent resident, or his son, Aaron, who is an Australian citizen. The review applicant misses his son and considers the only way to return him to Australia is if accompanied by the applicant, it is submitted.
25. The Tribunal has considered all the evidence before it, including the evidence of the review applicant and representative, and supporting documents provided.
26. The review applicant acknowledged that his father (the applicant) failed to indicate his travel history in the visitor visa application form and declared 'No' to previous travel history, even if not deliberately trying to mislead the Department.
27. The Tribunal notes that the 'material particular' for the purpose of PIC 4020(1) is the information provided in the visa application about the applicant's travel history. It is material because it concerns the genuineness of the visa applicant's intention to stay in Australia only temporarily: see cl.600.211.
28. On this basis, the Tribunal is not satisfied that there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is

false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made.

29. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

30. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
31. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
32. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
33. At hearing the review applicant said the main purpose for the visa is so that his father can accompany his son to return to Australia. He claims his father is the only person able to do so, given his work commitments (and the possibility of being delayed in China due to the country's ongoing COVID-related policies); because it is unlikely Aaron's mother would be able to obtain a visa to China presently (as an Australian citizen); and because the review applicant's mother is unwell, and it is not safe for her to travel.
34. The Tribunal accepts the reasons put forward as to why the applicant applied for the visitor visa: that is to accompany his grandson, Aaron to return to his parents in Australia, particularly in time to start school in 2023. It accepts the review applicant misses his son and wants him to return. However, the Tribunal does not accept that the only way for Aaron to return to Australia is to do so accompanied by the applicant. The Tribunal considers the review applicant could take some time off work to pick up his son, and if worried about delays due to China's COVID-19 related policies, he could meet his son (and father) in a third country for the purposes of bringing him home, for example. Whilst the Tribunal understands the review applicant's preference for his father to accompany his son from China to Australia, it is not satisfied on the evidence before it that this is the only option.
35. As such, the Tribunal does not accept the submission that the review applicant's son would not be able to see his parents or attend school for another year or so.
36. Accordingly, the Tribunal is not satisfied that there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa.
37. There is no submission or claim that there are compelling circumstances that affect the interest of Australia in this case that justify the grant of the visa.
38. Therefore the requirements of PIC 4020(1) should not be waived.

CONCLUSION

39. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 600.213.

DECISION

40. The Tribunal affirms the decision not to grant the applicant a Visitor (Class FA) visa.

Nicole Burns
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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